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BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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Revisions to Library Reference Rule)

Docket No. RM98-2

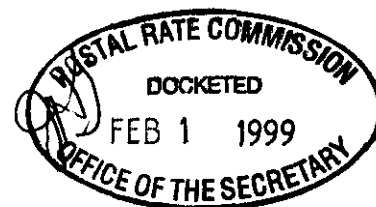
OFFICE OF THE CONSUMER ADVOCATE
COMMENTS IN RESPONSE TO ORDER NO. 1223
ON PROPOSED REVISIONS TO COMMISSION RULES
ON LIBRARY REFERENCES
(February 1, 1999)

The Commission's Notice and Order No. 1223 issued on December 17, 1999, invited comments no later than February 1, 1999, upon its proposed revisions to the Commission's rules regarding library references. The Office of the Consumer Advocate (OCA) hereby submits its comments on the proposed revisions.

I. INTRODUCTION

The Commission previously requested in this docket comments on proposed library reference rules in its Order No. 1219 dated August 27, 1998.¹ OCA filed comments on those proposed rules on October 14, 1998.² In those comments OCA suggested several adjustments to the proposed rules. In Order No. 1223 the Commission amended its original proposals, in part, by eliminating the proposed requirement for a motion to be filed with each library reference. OCA does not seek

¹ The proposed rules included many suggestions offered in OCA's response of October 3, 1997, to Notice of Inquiry No. 1 in Docket No. R97-1 (hereafter "Response"). The OCA response is included in this docket as part of library reference RM98-2-PRC-LR-1.



reinstatement of the motions procedure but believes the Commission should make clear an avenue for relief if the requirements for noticing and labeling library reference filings are ignored or abused.

The Commission declined to propose rules covering certain other OCA suggestions: Order No. 1223 does not require the filing of a road map of library references with each application as requested by OCA, it does not order the filing of survey data at the time survey results are filed, nor does it provide for specific relief if survey data is not submitted. The Commission deferred at least three other issues raised by OCA to a later docket. Those three issues relate to, (1) filing, with an application, all library references on which an applicant intends to rely as part of its direct case, (2) clarification of the obligations of designated sponsors, and (3) the designation of sponsors for each institutional interrogatory response.

Although workable, the rules are not as thorough as they might be and should be amended, particularly to require a road map cross-walk and the filing of survey data at the time survey results are filed. Two technical corrections to the proposals are also desirable as well as a minor clarification of Order No. 1223.

II. DISCUSSION

A. Cross-walk Road Map

Previous OCA pleadings have discussed the need for obtaining complete cross-reference information in library references as it relates to other documents filed in a case. OCA urges the Commission to emphasize in its final order that library references

² Office of the Consumer Advocate Comments in Response to Order No. 1219 on Proposed Revisions to Commission Rules on Library References (hereafter

must include sufficient information to provide participants a clear indication of the nature and purpose of the library reference. OCA also believes it is of utmost importance in easing the burden of reviewing library references that parties be able to associate each witness to the appropriate library references at the time applications are filed. For this, a clear road map in the form of a readily readable table listing, by witness, the library references relevant to that witness's testimony is necessary.

Subsection 31(b)(2)(iii), *Labels and descriptions*, offers a limited amount of assistance. Proposed Rule 31(b)(2)(iii) provides that each library reference shall include a preface or summary addressing the following matters: it requires labels and descriptions on library references to indicate the proceeding, the document or issue to which it relates, the participant designating, identity of witnesses sponsoring the material or a reason why the sponsor cannot be identified, and, to the extent feasible, other library references or testimony referred to in the library reference. Also required by the proposed rule is an explicit indication whether the library reference is an update or revision to a library reference filed in another proceeding together with an adequate identification of the predecessor material.

The proposed rules simply do not go far enough. They do not require an equally important cross-walk moving from the witnesses' testimony and exhibits to the library references. That is, it should be possible to determine which library reference or references a particular witness has relied upon or cited. Such a cross-walk is especially needed at the time of an initial application when hundreds of library references may be filed.

"Comments").

The Commission specifically recognized the need for a road map in Docket No.

R97-1 in ruling on motions seeking sponsors for library references:

At a minimum, the Postal Service should provide a complete, detailed road map to allow a reviewer easy access to sources used to develop a witness's conclusions.

The need for a complete, detailed road map can not be over emphasized. To a witness who has spent months developing cost studies to support testimony, it may be obvious how studies interrelate, and how one study provides the source of the justification for a relationship relied upon by a second study. To a reader less familiar with the topic, the relationship probably is not so clear.³

The changes to the library reference rules are intended to further a fundamental purpose of enabling participants in Commission proceedings timely access to the data underlying witness presentations. Future filings of library reference materials must not threaten to interfere with the due process rights of participants or the timely completion of Commission proceedings. Filing a mass of library references whose connection to various witnesses is incomprehensible without laboriously reviewing each library reference and notice is unfair.⁴

Dozens if not hundreds of library references are filed with an application in a major case. A stack of individual library reference notices and individually labeled library references, even if available on the internet or in hard copy, does not reasonably substitute for the simple cross-walk which OCA suggested in its comments.

³ Order On Certified Motions, Docket No. R97-1, November 4, 1997 at 14.

⁴ For instance, in Docket No. R97-1, the Postal Service filed 214 library references with its application. See the listing of 214 library references filed by the Postal Service which, for the most part, does not identify any witness or other individual as a sponsor of the library reference. Notice of Filing of Library References, Docket No. R97-1, July 10, 1997.

Participants should not be required to sift through the labels of every library reference to determine which of them may relate to a particular witness. When the Postal Service files its application, it should provide a cross-walk road map listing, by witness, the relevant library references and the pertinent portions of their testimony, exhibits, and workpapers to which the library references relate.⁵ Early in proceedings, participants must have ready access to necessary facts included within library references intended as part of a direct case sufficient to narrow the issues before going forward, or else due process is placed in jeopardy. Where Commission action within ten months of filing is required, processes that will ensure everyone can readily determine the relevant library references must be instituted. Otherwise, Congressional intent to insure full, open and fair proceedings is jeopardized.⁶ The rules must require an appropriate cross-reference road map for participants to insure the Postal Service and other parties cannot file mounds of library references as a matter of litigating strategy.

The Commission's reasoning that it does not find a detailed road map necessary because it is striking a balance among the interests of all concerned, (Order No. 1223 at 7) is not explained. In rejecting the request for a cross-walk, Order No. 1223 does not explain what or whose interests the Commission is balancing against OCA, other Commission staff and commissioners, and parties reviewing massive Postal Service filings who would greatly benefit from a road map of the library references. The burden

⁵ We incorporate by reference our discussion of the need for road maps from pages 16-21 of the Response.

⁶ See Comments of the Office of the Consumer Advocate to the Postal Rate Commission, Docket No. RM97-1, filed January 31, 1997 at 12-18.

upon each reviewer to scan all of the library references and notices to determine which references relate to the testimony of a particular witness far outweighs the limited additional burden on the Postal Service of preparing a cross-walk at the commencement of the case. Indeed, the Postal Service almost certainly prepares such a road map for its own litigation needs as it prepares its direct case.

Presentation of this information would not impose a burden upon the Postal Service. In fact, OCA demonstrated the magnitude of the library reference identification problem in the Comments.⁷ The Postal Service cannot reasonably object. Preparing a road map is simple, particularly when compared to the other information necessary for filings. A type of cross-walk road map, by witness, was included in the Postal Service's request filed in Docket No. R97-1 as Attachment F.⁸ However, that attachment listed only exhibits and workpapers. Merely adding a column for the library references sponsored by the witnesses would not be burdensome.

Given the constant filing of library references during a proceeding, the rule should also require that the Postal Service provide with each library reference filing an amendment to the table initially filed with the application listing, by witness, the pertinent portions of the testimony and exhibits to which the newly filed library reference relates. Updating the cross-walk from time to time as necessary would also not be too

⁷ See *supra* note 4.

⁸ As an example for reference, a page of that Attachment F was attached as Appendix B to OCA's Comments on Order No. 1219.

burdensome when compared to the parties' difficulties in reviewing the notices and labels piecemeal.⁹

In order to provide for the necessary road map with the initial filing and for later-filed library references, OCA recommends therefore an addition to proposed Rule 31(b)(2) concerning the contents of library reference filings. At the end of §31(b)(2)(ii), add the following paragraph: "The filing shall include a listing, by witness, of those witnesses who rely upon or cite to the library reference together with specific references to pages and schedules in testimony and exhibits where the library reference is cited. This listing shall be updated as additional library references are filed."

B. Testimony and Exhibits Must Contain Adequate References

Related to the need for a clear road map to speed the review process of witness testimony is the necessity that testimony and exhibits contain adequate references. OCA made the following suggestions in its earlier comments but the Commission did not discuss the point.

Testimony and exhibits often cite to voluminous amounts of complex data. In the past, references provided by the Postal Service have not been precise. To avoid

⁹ We noted in previous comments that inasmuch as hundreds of library references are filed, a simple workable system to continually update a cross-walk is desirable. In Docket No. R97-1, a total of 354 library references were filed: 214 with the July 10, 1998 application filing and another 140 between July 31, 1997 and March 20, 1998. By OCA's count, there were 127 working days during the latter period. Therefore, over that period an average of more than 1.1 Postal Service library references were filed per day. In addition, another 50 library references were filed by 13 other participants in that proceeding. In Docket No. R90-1, the Postal Service filing included over 200 library references with its initial request. Ultimately, in Docket No. R90-1, almost 350 library references were filed by the Postal Service and about 80 more were filed by intervenors. See OCA Motion for Special Rules of Practice for Filing Library References, Docket No. R94-1, April 1, 1994 at 1.

delays in reviewing documentation, documents must include comprehensive citation references to the appropriate page and, where necessary, line numbers of other materials filed in the proceeding. OCA therefore proposes that the Commission add a sentence to Rule 31(b)(1) which is consistent with the intent of the Commission's proposals herein and emphasizes the need for specific references in all testimony and exhibits. After the first sentence of Rule 31(b)(1) insert, "Exhibits prepared for Commission proceedings shall cite with specificity the page and, if necessary for comprehension, the line number, of specific portions of testimony, exhibits, library references or other referenced material."

C. Survey data---Proposed rule 31(b)(2)(ii)(c)

OCA also suggested a rule regarding survey data which is not contained in Order No. 1223 and which the Commission did not discuss.¹⁰ Proposed Rule 31(b)(2)(ii)(c) requires motions for library references to indicate whether the subject library reference "contains a survey or survey results." This differs significantly from the OCA proposal that participants be required to submit all data collected pursuant to a survey with the participant's initial filing of its direct case and not just upon subsequent request. In order to speed the reviewing process and eliminate the necessity for interrogatories to obtain data for each survey reported, the rules should require such underlying data in all cases. This provides for a more efficient administration of the hearing process and insures the Commission's files contain necessary supporting data if the Commission decides certain survey conclusions are to be given weight in reaching a decision. Also, the Commission should amend the rules to provide for self-

enforcement in the event the above rule is not met. As OCA previously suggested, the Commission should provide that survey results are entitled to little weight if they cannot be tested and verified for lack of underlying data.

D. Deferred Issues

The Commission deferred two issues raised by OCA as being beyond the scope of the rule. The Commission said Docket No. RM98-3 may provide an appropriate vehicle for broader issues. In addition, a third issue regarding the obligations of a sponsor was not discussed by the Commission and was apparently deferred.

First, OCA asked the Commission to amend Rule 53 to require the Postal Service to file with its application those library references on which it intends to rely as part of its direct case and to identify the sponsors of all the library reference material submitted with the application even if not relied upon as part of the direct case.¹¹ The Commission deferred the request. OCA's recommendation would ensure early notification by the Postal Service of not only the direct evidence contained in direct testimony and exhibits but the library references and other material on which it intends to rely, together with sponsoring witnesses for all material filed at the time of the application. Rule 53 should be amended accordingly. Otherwise, the Postal Service would still be able to employ litigation strategy and delay filing library references which it anticipates will be a necessary part of its direct case until a date sometime later than

¹⁰ Comments at 11-12.

¹¹ Comments at 7-8. This was previously presented by OCA in the Response at 21.

the application date, thus reducing the time for review and infringing upon the fairness of the Commission's processes and hearings.¹²

Although OCA's proposal relates to the issue of library references, it does not involve §31 which is the only rule the Commission is revising in this docket. There is no specific harm in deferring consideration of these points to the ongoing later docket. On the other hand, the issue is not necessarily beyond the scope of this docket. There is no particular reason not to amend the rule now. Rule 53 could be readily amended at this time and adjusted later if necessary in response to comments in Docket No. RM98-3. In fact, such an amendment here would be more tidy as the entire issue of library references could be treated together rather than piecemeal. The rule would also tighten the regulations with respect to any Postal Service application by insuring the Postal Service has its case complete at the time of filing. It also prevents the Postal Service from strategically dropping a trail of library reference breadcrumbs for participants to trace along the path toward hearings, searching for the Postal Service's direct case.

The second OCA issue deferred by the Commission to a later docket relates to the suggestion that institutional answers shall designate a sponsoring witness by amending rule 25(b).¹³ The Commission order stated that Docket No. RM98-3 may be

¹² In Docket No. R97-1 the Postal Service filed numerous library references with its application which were necessary to review the application, many of which were later introduced into evidence by the Postal Service as material upon which it relied. See the OCA Response at 10-14 and the road map laboriously assembled by OCA following the application which was included as Attachment A to the Response.

¹³ Comments at 14.

the appropriate vehicle for addressing the issue and that resolution of issues in this area must be postponed.¹⁴

A third issue raised by OCA, which the Commission apparently deferred, relates to the OCA request that the Commission clarify the obligations of a designated sponsor of a library reference. OCA asked the Commission to amend the rules to clarify its policy as to the obligation of sponsors with regard to factual questions and with regard to library references prepared by the filing party or someone affiliated with the party or to otherwise explain why analyses and conclusions are not adopted.¹⁵ This clarification would avoid uncertainty, particularly for newer participants in the Commission's proceedings.

E. Technical Corrections

Following are two suggested technical corrections to the proposed rules and a suggestion regarding Order No. 1223 in order to conform them to the stated intentions of the Commission.

1. Without explanation, the Commission in Order No. 1223 inserted an "and" at the end of §31((b)(2)(i)(a) which has the effect of requiring, as a condition of filing a library reference, that the physical characteristic of the material renders service unduly burdensome plus either of the circumstances enumerated in the following subsections (b),(c), (d) or (e). In other words, under the language of the rule as proposed, if a library reference is to be filed, service must be burdensome and one of the other enumerated circumstances must be present. This is contrary to the sense of the previous rule

¹⁴ Order at 4.

¹⁵ Comments at 12-13.

proposed in Order No. 1219 where the sections are joined only by semi-colons with neither "and" nor "or." If this change is not inadvertent, the Commission should consider that the impact would be to restrict the filing of library references only to documents too burdensome to serve. That is clearly not the case at present as many of the filed library reference documents are not bulky. It appears, therefore, a technical correction is required to change the "and" to "or" at the end of §31(b)(2)(i)(a).

2. An additional technical correction is required. In §31(b)(2)(i)(c) the initial phrasing was not modified to conform to the removal of the motion requirement in the way the other subsections (b) and (d) were adjusted. To provide uniformity and clarity, OCA suggests deletion of the following portion of the opening phrase in subsection (c): "...the participant satisfactorily demonstrates that...."

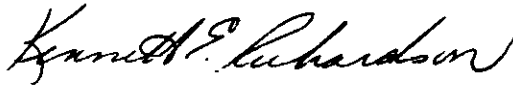
3. Order No. 1223 also includes a minor misstatement that might be confusing and which the Commission may wish to clarify in its further order. On page 8 of Order No. 1223, the Commission states it is requiring in situations meeting the terms of §31(b)(2)(i)(a) and (b) that the filing participant provide a copy of requested material within a specific period of time. Later, in the same paragraph, in accordance with the proposed rule, the Commission correctly limits the situation to subsection (b). The language of the proposed rule clearly restricts the situations to subsection (b) and not (a).

III. CONCLUSION

The proposed rules do not go far enough to avoid continued confusion concerning the use of library references and should require a better road map from the Postal Service and others at the time of filing library references. As proposed, the rules

still do not provide the kind of guidance that is truly necessary for any participant needing to review a large portion of the Postal Service case. Also, survey data must be required and the status of unsupported surveys is unclear and too ambiguous. Finally, although the issues deferred by the Commission could be conveniently considered herein, they certainly should be considered in a later docket, preferably Docket No. RM98-3.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kenneth E. Richardson".

Kenneth E. Richardson
Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice.

A handwritten signature in black ink, reading "Kenneth E. Richardson". The signature is fluid and cursive, with the first name "Kenneth" and last name "Richardson" clearly legible.

KENNETH E. RICHARDSON
Attorney

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February 1, 1998